

## Chicago-Kent Law Review

---

Volume 94

Issue 2 *The Trump Administration and Administrative Law*

Article 6

---

5-1-2019

# Civil Servant Disobedience

Jennifer Nou

*University of Chicago Law School*

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

Part of the [Administrative Law Commons](#), and the [President/Executive Department Commons](#)

---

### Recommended Citation

Jennifer Nou, *Civil Servant Disobedience*, 94 Chi.-Kent L. Rev. 349 (2019).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol94/iss2/6>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

## CIVIL SERVANT DISOBEDIENCE

JENNIFER NOU\*

INTRODUCTION .....	349
I. CIVIL DISOBEDIENCE .....	354
<i>A. By Private Citizens</i> .....	354
<i>B. By Civil Servants</i> .....	356
II. EVALUATING CIVIL SERVANT DISOBEDIENCE.....	362
<i>A. Internal Process-Perfection</i> .....	363
<i>B. Further Conditions</i> .....	367
<i>C. Grounds for Disobedience</i> .....	373
III. IMPLICATIONS .....	378
<i>A. The Exit Objection</i> .....	378
<i>B. Backlash</i> .....	379
CONCLUSION.....	381

### INTRODUCTION

Administrative agencies are hierarchical bureaucracies. But those on the lower rungs don't always fall lockstep in line with those at the top. Reasons vary. Sometimes, intra-agency communication is poor. Those laboring below may not know the preferences of their superiors. Even when this information is available, sometimes bureaucrats are lazy; they can "shirk." Or they may simply disagree with what their bosses want; they might "drift." Each of these themes have been mainstays of principal-agent

\* Professor and Ronald H. Coase Teaching Scholar, University of Chicago Law School. This paper was prepared for Chicago-Kent College of Law's Symposium on "The Trump Administration and Administrative Law" held on November 29–30, 2018. Many thanks to Peter Strauss for organizing and to Joel Mintz and Bijal Shah for their thoughtful and instructive responses. For helpful conversations and comments, thanks as well to Rebecca Ingber, Sally Katzen, Tom McGarity, James Pfiffner, Eric Posner, David Pozen, Jeremy Rabkin, Bill Valdez, Christopher Walker, Philip Wallach and participants at a faculty workshop at DePaul University College of Law; Chicago-Kent College of Law's Conference on the "Trump Administration and Administrative Law"; and Antonin Scalia Law School's Roundtable and Conference on the "New Normals? The Trump Administration and Administrative Law." Michael Christ, Connie Guo, Megan Lindgren and Alexandria Piacenti provided excellent research assistance.

models across various disciplines.<sup>1</sup> Legal scholars too have studied bureaucratic resistance, mainly of civil servants within the executive branch.<sup>2</sup> These analyses have mostly endorsed career staff serving as a check on executive overreach.<sup>3</sup>

The Trump administration has renewed interest in the subject,<sup>4</sup> as many perceived the traditional separation-of-powers to be in peril, especially in a time of unified government. Trump's rhetoric and choice of agency appointees heightened the sense that political norms and institutions were at risk. If the press couldn't constrain a media-savvy President, many hoped, perhaps a principled bureaucracy could. And like it or not, civil servants have come out swinging. Some have reportedly created support groups to oppose the Trump Administration and signed up for workshops on how to resist.<sup>5</sup> Others have filed complaints with inspectors general offices.<sup>6</sup> Career staff have allegedly taken to social media to voice their opposition, whether in the

1. Public administration scholars, for example, have long questioned "bureaucratic responsiveness." See, e.g., Grace Hall Saltzstein, *Bureaucratic Responsiveness: Conceptual Issues and Current Research*, 2 J. PUB. ADMIN. RES. & THEORY 63 (1992). Implicit is the premise that many bureaucrats are unresponsive, that is, their behavior does not change for newly-appointed agency heads. Forget inertia—other social scientists have also analyzed the related phenomenon of "bureaucratic autonomy," the ways in which career staff can actively forge policy outcomes themselves. See, e.g., DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928* (2001).

2. See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 4 (2006); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 541 (2015); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016); Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601 (2013); Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 18 J.L. & POL. 129 (2013). See also sources cited *infra* note 4.

3. See, e.g., Katyal, *supra* note 2; Michaels, *supra* note 2.

4. See, e.g., Josh Chafetz, *Constitutional Maturity, or Reading Weber in the Age of Trump*, 34 CONST. COMMENT. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3314926](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3314926) [https://perma.cc/66XQ-QJJ5]; Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139 (2018); Heidi Kitrosser, *Accountability in the Deep State*, 65 UCLA L. REV. 1532 (2018); Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018); Keith A. Petty, *Duty and Disobedience: The Conflict of Conscience and Compliance in the Trump Era*, 45 PEPP. L. REV. 55 (2018).

5. Juliet Eilperin, Lisa Rein, & Marc Fisher, *Resistance from within: Federal workers push back against Trump*, WASH. POST (Jan. 31, 2017), [https://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c\\_story.html?utm\\_term=.4c64d45d2048](https://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.4c64d45d2048) [https://perma.cc/BUG9-YAPV].

6. *Id.* ("At the Justice Department, an employee in the division that administers grants to nonprofits fighting domestic violence and researching sex crimes said the office has been planning to slow its work and to file complaints with the inspector general's office if asked to shift grants away from their mission.").

form of alternative Twitter accounts or more official channels.<sup>7</sup> Others have drafted reports to reach conclusions contrary to those desired by policy officials.<sup>8</sup>

Bureaucratic resistance is hardly new—as evidenced by the decades of scholarship studying it. Staffers at the Bureau of Land Management under President Clinton, for example, confessed to leaking internal documents to the media before any official policy announcements were made.<sup>9</sup> Careerists at the Department of Agriculture reported to working-to-rule: doing what was “technically required” but refusing to “advocate” for the food stamp policies of President Reagan.<sup>10</sup> Indeed, the Reagan Administration also encountered well-documented friction with enforcement officials at the Environmental Protection Agency (EPA).<sup>11</sup>

What seems potentially novel in the Trump Administration, however, is the extent to which that resistance is publicly defiant.<sup>12</sup> Instead of being covert or channeled through official mechanisms, a greater degree of dissent seems to have spilled out into the open by civil servants identified as such. Bureaucrats seem to be increasingly opposing the President in their official capacity.<sup>13</sup> And they are doing so despite strong agency norms to the contrary.<sup>14</sup> The relative novelty of these dynamics is difficult, if not impossible, to verify empirically. If correct, however, this development

7. *Id.* See also *Why this U.S. civil servant runs a rogue Twitter account against Trump*, CBC RADIO (Apr. 27, 2017), <https://www.cbc.ca/radio/thecurrent/the-current-in-washington-april-27-2017-1.4086913/why-this-u-s-civil-servant-runs-a-rogue-twitter-account-against-trump-1.4086924> [https://perma.cc/VT3V-3P3X].

8. Christopher Flavelle & Benjamin Bain, *Washington Bureaucrats Are Quietly Working to Undermine Trump's Agenda*, BLOOMBERG (Dec. 18, 2017), <https://www.bloomberg.com/news/features/2017-12-18/washington-bureaucrats-are-chipping-away-at-trump-s-agenda> [https://perma.cc/2APA-BYVV].

9. Emily Yehle, *Tricky decision: Who gets a heads-up before a rollout?*, E&E NEWS (Mar. 11, 2016), <https://www.eenews.net/stories/1060033867> [https://perma.cc/XK9R-U837].

10. MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS?: POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS 74–75* (2000); see also Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809 (2015).

11. See GOLDEN, *supra* note 10; JOEL A. MINTZ, *ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES* 40–83 (1995). See generally EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982).

12. Jennifer Nou, *Taming the Shallow State*, 36 YALE J. ON REG.: NOTICE & COMMENT (Feb. 28, 2017), <http://yalejreg.com/nc/taming-the-shallow-state-by-jennifer-nou/> [https://perma.cc/N3VW-MTCJ].

13. Coral Davenport, *E.P.A. Workers Try to Block Pruitt in Show of Defiance*, N.Y. TIMES (Feb. 16, 2017), <https://www.nytimes.com/2017/02/16/us/politics/scott-pruitt-environmental-protection-agency.html?mcubz=3> [http://perma.cc/9Z63-WU4G] (“[F]ormer E.P.A. officials said the open rebellion by current employees was extraordinary . . .”).

14. See Shinar, *supra* note 2, at 609 (noting that “official resistance” will sometimes manifest in explicit refusal but will often take on more covert forms).

suggests the heightened need to consider its implications in an administrative state premised on hierarchy and political control.<sup>15</sup>

This article is an initial exploration of the implications of civil servant disobedience, a distinctly overt and communicative form of official protest.<sup>16</sup> The aim is not to advocate for disobedience—for the arguments against it are very strong—but rather to examine principles for normatively evaluating the practice. Elucidating them can very well lead one to determine that the phenomenon is rarely, if ever, justified. In that spirit, the conclusions reached here are tentative and likely to be revisited in future work. The hope is to start, not end, more nuanced conversations—to move past simplistic references to the “deep state” or “the resistance” towards a greater appreciation of the complexity of intra-executive branch dynamics.

Civil servant disobedience, as defined here, refers to conscientious and public acts of defiance against political appointees. Just as debates over civil disobedience by private citizens arose in social context—the civil rights movement, Vietnam War-era protests, assertions of religious liberty—so too does the phenomenon of civil servant disobedience under the Trump Administration. Indeed, it is worth briefly reflecting upon why this practice has intensified of late. Civil servants have historically held a strong sense of “role perception,” backed by powerful norms regarding appropriate institutional behavior.<sup>17</sup> These norms have included respect for politically-appointed superiors and the need to channel dissent through appropriate internal channels. One defining characteristic of the Trump presidency, however, has been its willingness to undermine long-held norms coupled with its open hostility to the civil service.<sup>18</sup> Previous Presidents, to be sure,

15. See Paul Horwitz, *What Will the Federal Government's Resistance to President Trump Look Like?*, JOTWELL (Apr. 10, 2017), <https://conlaw.jotwell.com/what-will-the-federal-governments-resistance-to-president-trump-look-like/> [https://perma.cc/GRA8-U96N] (reviewing Daniel Correa, *Civil Dissent by Obedience and Disobedience: Exploiting the Gap Between Official Rules and Societal Norms and Expectations*, 8 WASH. U. JURIS. REV. 219 (2016), and responding to Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809 (2015); Jennifer Nou, *Bureaucratic Resistance From Below*, 36 YALE J. ON REG.: NOTICE & COMMENT (Nov. 16, 2016), <http://yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/> [https://perma.cc/F324-Q4AC]; Nou, *supra* note 12).

16. It should be noted that the phrase “civil servant disobedience” is not entirely new to the legal literature, but the concept has yet to be systematically specified or evaluated. See Alex Hemmer, *Civil Servant Suits*, 124 YALE L.J. 758 (2014).

17. See, e.g., James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57 (1987) (“[C]areer civil servants are motivated, at least in part, by their role perception, [which] leads them to cooperate with their appointed principals in the executive branch.”).

18. See Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430 (2018).

have railed against what they perceived as a bloated federal bureaucracy.<sup>19</sup> But the tone and rhetoric of this administration seems unprecedented.<sup>20</sup> Civil servant disobedience may be the natural response.

Part I will introduce the concept of civil servant disobedience by reference to the philosophical literature on civil disobedience by private citizens. Civil servant disobedience will be defined as overt, good-faith acts of protest by civil servants acting in their official capacity in violation of executive directives. Part II will then evaluate the practice against various conceptions of administrative democracy. It will introduce the ideal of reciprocal hierarchy, according to which the views of civil servants are duly considered by appointed agency heads. This ideal emphasizes not only top-down means of control, but also facilitates bottom-up concerns. When these ideals are violated, normative space for legitimate civil servant disobedience arguably arises. In this sense, the practice is valid when it is administrative-process-perfecting.

In addition, this Part also considers other necessary factors for civil disobedience to be legitimate. They include the extent to which such behavior arises under statutes that can be read to require consultation with expert, career staff. In addition, such activity must also conform to professional norms; be used only as a measure of last resort; and exhibit a willingness to accept the legal consequences. Part III then takes a step back to consider an alternative to civil servant disobedience—resignation—and disobedience's more dynamic effects. It concludes that the longer run harms to the administrative state, including presidential backlash, must be seriously balanced against the potential democratic benefits.

19. Throughout his presidency, Reagan laced his speeches with criticism of the bureaucracy. *See, e.g.,* Hedrick Smith, *Reagan's Effort to Change Course of Government*, N.Y. TIMES (Oct. 23, 1984), <https://www.nytimes.com/1984/10/23/us/reagan-s-effort-to-change-course-of-government.html> [<https://perma.cc/2S3R-VH2U>] (quoting President Reagan's famous declaration: "Government is not the solution to our problem. Government is the problem"). Criticism of the civil service is not a single-party affair. *See, e.g., Clinton Takes Aim at Bureaucracy*, CHI. TRIB. (Feb. 11, 1993), <https://www.chicagotribune.com/news/ct-xpm-1993-02-11-9303177668-story.html> [<https://perma.cc/3L8Q-BH3H>] (describing President Clinton's "giddy" announcement that he had "ordered a substantial reduction in the federal work force and significant, year-by-year cuts in the administrative costs of each department").

20. *See, e.g.,* Jon Michaels, *How Trump is dismantling a pillar of the American state*, THE GUARDIAN (Nov. 7, 2017), <https://www.theguardian.com/commentisfree/2017/nov/07/donald-trump-dismantling-american-administrative-state> [<https://perma.cc/9WDC-X3VE>]; Jonathan Lemire, *Trump White House Sees 'Deep State' behind Leaks, Opposition*, ASSOCIATED PRESS (Mar. 14, 2017), <https://apnews.com/363ccdba946548bfa4b855ae38d1797a> [<https://perma.cc/6P2P-BWW6>]; Eric Katz, *White House to 'Career Bureaucrats' Who Disagree with Trump: Get on Board or Get Out*, GOV. EXEC. (Jan. 30, 2017), <https://www.govexec.com/management/2017/01/white-house-career-bureaucrats-who-disagree-trump-get-board-or-get-out/134997/> [<https://perma.cc/7YVA-P3Y3>].

## I. CIVIL DISOBEDIENCE

The first section briefly surveys various controversies regarding civil disobedience by private citizens to help motivate thinking about their bureaucratic analogues.<sup>21</sup> The next section then explores the strengths and limits of the analogy and their implications.

### A. By Private Citizens

Political philosophers have long contemplated the legitimacy of civil disobedience as a social practice.<sup>22</sup> Perceived exemplars of the phenomenon include Henry David Thoreau's refusal to pay a poll tax,<sup>23</sup> the peaceful marches of the civil rights movement, and anti-Vietnam War protests, to name a few. The precise definition of civil disobedience remains contested, but one classic formulation is that of "a public, non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in law or policies of government."<sup>24</sup> Some features of this definition—and the debates surrounding them—are worth briefly unpacking.

First, civil disobedience is often understood as nonviolent by contrast to the more violent tactics associated with revolution or rebellion. In addition, civil disobedience is widely agreed to be a communicative act, an appeal to the public sphere. This aspect aligns with many intuitions about the practice as a means of provoking dialogue<sup>25</sup> as well as to relay a message otherwise unheard through existing political channels. For our purposes, the phenomenon includes both traditional dissent as well as "dissenting by deciding," that is, dissenting through official action.<sup>26</sup> Understanding civil disobedience with respect to its communicative intent helps to explain its

21. See Horwitz, *supra* note 15; Shinar, *supra* note 2 (comparing political disobedience by private and public officials).

22. See, e.g., Hannah Arendt, *Civil Disobedience*, in *CRISES OF THE REPUBLIC* 49, 51 (1972); KIMBERLY BROWNLEE, *CONSCIENCE AND CONVICTION: THE CASE FOR CIVIL DISOBEDIENCE* 17 (Timothy Endicott et al. eds., 2012); KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 29 (1987); JOHN RAWLS, *A THEORY OF JUSTICE* 363 (1971); PETER SINGER, *DEMOCRACY AND DISOBEDIENCE* 2, 10 (1973); Hugo Adam Bedau, *Civil Disobedience and Personal Responsibility for Injustice*, in *CIVIL DISOBEDIENCE IN FOCUS* 49 (Hugo Adam Bedau ed., 1991); Jurgen Habermas, *Civil Disobedience: Litmus Test for the Democratic Constitutional State*, 30 *BERKELEY J. SOC.* 95 (1985).

23. Stephen R. Alton, *In the Wake of Thoreau: Four Modern Legal Philosophers and the Theory of Nonviolent Civil Disobedience*, 24 *LOY. U. CHI. L.J.* 40–41 (1992).

24. RAWLS, *supra* note 22, at 364.

25. See, e.g., Martin Luther King, Jr., *Letter From Birmingham City Jail*, in *CIVIL DISOBEDIENCE IN FOCUS*, *supra* note 22, at 68, 70–71.

26. Heather K. Gerken, *Dissenting by Deciding*, 57 *STAN. L. REV.* 1745, 1750 (2005) ("Dissenting by deciding fuses the collective act with the public one, allowing electoral minorities to act collectively at the same moment they act on behalf of the polity.").

nonviolent orientation, for violence would make it less likely for arguments to be heard and seriously considered.<sup>27</sup>

Civil disobedience is also often understood as conscientious, that is “serious, sincere, and based on conviction.”<sup>28</sup> In other words, the civilly disobedient do not act for strategic or merely self-serving reasons, but rather act in good-faith. They genuinely believe in their stated ends. Put in Rawlsian terms, civil disobedience must be framed in terms of public reasons even though motivated by comprehensive doctrines. Thus, even if Martin Luther King, Jr., was motivated by religious convictions, many of his actions could be characterized as civil disobedience since they were also framed in terms of political equality.<sup>29</sup>

Accounts of civil disobedience also usually emphasize the role of illegality. Unlawful acts can include both direct refusals to comply with the laws under protest, as well as the violation of more minor laws as a means of opposition. For example, civil disobedience can include the breaking of a discriminatory law that is the object of dissent: The mayor of San Francisco presided over gay and lesbian weddings in defiance of a law banning it, invoking *Letter from a Birmingham Jail* in doing so.<sup>30</sup> Alternatively, civil disobedience can also entail the breaking of a more minor trespass law when entering the site of a nuclear power plant to protest it.<sup>31</sup>

Predictably, legal scholars have been more attentive than philosophers to the nuance and complications that arise when contemplating what “law”-breaking entails in this context.<sup>32</sup> One legalist approach views “law” as only those laws that are “clearly valid” and “without a colorable constitutional claim” of invalidity.<sup>33</sup> In this view, law is “clearly valid” when the particular

27. RAWLS, *supra* note 22, at 366.

28. See Bulman-Pozen & Pozen, *supra* note 10. See also BROWNLEE, *supra* note 22.

29. RAWLS, *supra* note 22, at 365; Kimberley Brownlee, *Civil Disobedience*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2017), <https://plato.stanford.edu/entries/civil-disobedience> [<https://perma.cc/EH8U-EF63>].

30. See *Mayor defends same-sex marriages*, CNN (Feb. 22, 2004), <http://www.gavinnewsom.com/index.php?id+47> [<https://perma.cc/82UY-KWPF>] (reprinting transcript of an interview with Gavin Newsom invoking letter and themes of civil disobedience).

31. Brownlee, *supra* note 29; Bulman-Pozen & Pozen, *supra* note 10, at 823.

32. See, e.g., Charles L. Black, Jr., *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 TEX. L. REV. 492 (1965); Archibald Cox, *Direct Action, Civil Disobedience, and the Constitution*, in CIVIL RIGHTS, THE CONSTITUTION, AND THE COURTS 2, 3 (1967); ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE (1968); Nicholas Katzenbach, *Protest, Politics and the First Amendment*, 44 TUL. L. REV. 439 (1970); Burke Marshall, *The Protest Movement and the Law*, 51 VA. L. REV. 785 (1965); Bulman-Pozen & Pozen, *supra* note 10, at 813.

33. Elliot Zashin, *Civil Rights and Civil Disobedience: The Limits of Legalism*, 52 TEX. L. REV. 285, 290 (1974).



legal question has been adjudicated with finality by the Supreme Court.<sup>34</sup> As such, the civil rights movement's violation of state law was not "law-breaking" because the Supreme Court ultimately vindicated the constitutional arguments set forth by the movement's proponents, rendering the state laws unconstitutional.<sup>35</sup> Many of the demonstrations were thus not cases of civil disobedience (which requires lawbreaking), but rather constitutionally-protected protest. A contrary view provides that whether behavior constitutes political obedience or not does not depend on subsequent court rulings; all that matters is that "at the time of the violation there is a law or custom that a government official stands ready to enforce against the protestor."<sup>36</sup> In other words, law-breaking occurs when an individual contravenes the executive's interpretation of the law, even if a court has yet to address it.

### *B. By Civil Servants*

Civil disobedience by government employees raises a host of related, albeit distinct, issues. Identifying a form of bureaucratic resistance akin to civil disobedience is potentially fruitful for several reasons. First, both phenomena raise the more general problem of overt political disobedience: the question of when actors can openly defy duly elected or appointed officials. Both also arise in contexts where rules—managerial or legal—underlie a regime's legitimacy. Flouting those rules presents a threat to the governing order, whether a functional bureaucracy or a political democracy.

On the other hand, disobedience by public officials also raises many issues distinct from that of private citizens, which may lead to diverging normative conclusions. For example, unlike democratic citizens, civil servants are subject to norms of hierarchical deference. They occupy impersonal offices, from which they can resign. At the same time, civil servants also possess specialized expertise and may have privileged access to politically relevant information.

Before engaging in normative evaluation, it is first important to be more precise about the discrete social practice at hand. While others have fruitfully taxonomized varieties of bureaucratic resistance,<sup>37</sup> the aim here is just the opposite: to isolate one increasingly prevalent form of resistance and subject

34. Cox, *supra* note 32.

35. See Zashin, *supra* note 33, at 289.

36. See Hugo Bedau, *On Civil Disobedience*, in OBLIGATION AND DISSENT (Donald W. Hanson ed., 1971).

37. See e.g., Ingber, *supra* note 4; Shinar, *supra* note 2, at 630–45.

it to scrutiny. Begin, then, with some potential examples of civil servant disobedience:

- Ten Immigration and Customs Enforcement (ICE) officials openly refused to implement a Department of Homeland Security (DHS) directive deferring deportations of certain young, undocumented immigrants.<sup>38</sup> The line officers argued that compliance would require them to engage in illegal behavior that violated their oaths of office.<sup>39</sup> They then sued the head of DHS, who had been appointed by President Obama.<sup>40</sup>
- Management at the Department of Housing and Urban Development (HUD) directed the agency's departmental records officer, Marcus Smallwood, to compile documents related to a congressional request. The request concerned alleged office decoration efforts by HUD Secretary Ben Carson. Smallwood instead wrote an open letter to Carson stating: "I do not have confidence that HUD can truthfully provide the evidence . . . because there has been a concerted effort to stop email traffic regarding these matters prior to August 1st."<sup>41</sup> In other words, a civil servant openly accused agency leadership of attempting to suppress evidence.
- Environmental Protection Agency (EPA) employees engaged in public protests against Trump's then-new EPA Administrator, Scott Pruitt.<sup>42</sup> Some have remarked upon the "open rebellion" within the EPA more generally.<sup>43</sup>

38. The lead plaintiff was a then-current ICE agent and head of the ICE Agents and Officers Union. His fellow plaintiffs were ICE agents stationed around the country. *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013).

39. *Id.*

40. *Id.*

41. Juliet Eilperin, *HUD to comply with congressional request on redecoration of Carson's office*, WASH. POST (Mar. 6, 2018), [https://www.washingtonpost.com/politics/hud-to-comply-with-congressional-request-on-redecoration-of-carsons-office/2018/03/06/de229cb6-217d-11e8-86f6-54bfff693d2b\\_story.html?noredirect=on&utm\\_term=.ccc2a33ef64d](https://www.washingtonpost.com/politics/hud-to-comply-with-congressional-request-on-redecoration-of-carsons-office/2018/03/06/de229cb6-217d-11e8-86f6-54bfff693d2b_story.html?noredirect=on&utm_term=.ccc2a33ef64d) [<https://perma.cc/XZU3-WWE8>].

42. Davenport, *supra* note 13. See Eric Katz, *EPA Employees Vow to 'Stand Up! Fight Back!' Against New Administration, Budget Cuts*, GOV. EXEC. (Mar. 15, 2017), <https://www.govexec.com/management/2017/03/epa-employees-protest-trump-pruitt-outside-agency-headquarters/136181/> [<https://perma.cc/S4SR-YRZC>]. See also *Hundreds of current and former EPA employees protest Trump's nominee in Chicago*, CHI. TRIB. (Feb. 6, 2017, 5:32 PM), <https://www.chicagotribune.com/news/local/breaking/ct-trump-epa-protest-chicago-20170206-story.html> [<https://perma.cc/9CE2-7T9W>].

43. Davenport, *supra* note 13.

As these examples suggest, civil servant disobedience involves individuals acting in their official versus private capacities.<sup>44</sup> It is important that the dissident, in other words, make clear that they are dissenting as a civil servant, rather than as a private citizen. By contrast, objections raised by employees after they have resigned are not acts of civil servant disobedience; rather, they are simply engaged in political protest. Because they have resigned, these individuals are no longer subject to the same sanctions nor have as much at stake.<sup>45</sup>

Civil servant disobedience must also be nonviolent and conscientious. Resistance that is selfish and self-serving, by contrast, is better understood as a form of insubordination. Of course, delineating the motives for one's actions is not always straightforward, but it is important to isolate acts made in good-faith. Civil servant disobedience, again like its private counterpart, should also be understood as communicative—an open effort to bring about reform. Thus, the Department of Justice career lawyer that privately refuses to work on a case with which she legally disagrees is not necessarily being civilly disobedient. Such actions can serve as a form of private protest more akin to what philosophers identify as conscientious objection.<sup>46</sup> Conscientious objection, unlike civil disobedience, is not carried out as an effort at broader reform, but rather as a means of individual non-participation.<sup>47</sup> The aim is not political change, but preserving one's sense of personal integrity. Public dissent intended to spur social change, by contrast, does constitute civil servant disobedience.

Overt, rather than covert, defiance is particularly notable here since such behavior strays so far from the norms of “faceless” bureaucrats. Indeed, resistance within administrative agencies is far more likely to fly under-the-radar.<sup>48</sup> All the more important to understand the stakes when civil servants openly defy the governing administration. Such defiance, even if open, can take different forms. For example, one can engage in disobedience in one's own name—or else publicly, yet anonymously. Consider the Twitter accounts that emerged after the Trump Administration imposed a so-called

44. See Shinar, *supra* note 2, at 606 (noting that “official resistance” is “by definition, not exercised by private individuals”).

45. “Noisy resignations” that defy the usual norm of bureaucrats who exit quietly are likely to warrant their own normative evaluation. See the more general discussion regarding resignation at Section III.A.

46. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 277–86 (1979); Carl Cohen, *Conscientious Objection*, 78 *ETHICS* 269 (July 1968).

47. Brownlee, *supra* note 29.

48. See Shinar, *supra* note 2, at 611 (observing that official “resistance will take on relatively covert forms”).

gag order prohibiting employees from speaking with the press. Civil servants allegedly flouted the order by tweeting information about climate change and other policies clashing with those of the administration.<sup>49</sup> Many of these accounts explicitly identified themselves as operated from within the career staff ranks.<sup>50</sup> Though their veracity remains uncertain, these accounts constitute a form of public but anonymous political disobedience. The disobedience is open, but the identity of the disobedient is unknown. Leaking also has these characteristics. Insofar as some leaks involve legally prohibited public disclosures by unidentified civil servants of confidential government information, they too could be examples of anonymous yet open disobedience.<sup>51</sup>

While public, yet anonymous, behavior shares many characteristics with civil servant disobedience, it is useful to recognize it as a separate phenomenon. Anonymity arguably fails to honor norms of public deliberation between free and equal citizens.<sup>52</sup> It can also show insufficient respect for the rule of law since anonymity protects the lawbreaker from suffering the consequences of her actions. Anonymity also renders one's motives more suspect; it makes it more difficult to verify whether the act is conscientious or self-serving. Relatedly, it is more difficult for others to challenge the anonymous bureaucrat, thereby potentially limiting the effectiveness and verifiability of the dissent's substance.<sup>53</sup> Civil servant disobedience, as understood here, will thus not include anonymous behavior in its definition.

Another thorny dimension of isolating civil servant disobedience is specifying what it means for bureaucrats to be engaged in unlawful behavior. Lawbreaking, after all, is a critical component of civil disobedience.<sup>54</sup> For

49. Steve Gorman, *Defying Trump, Twitter feeds for U.S. government scientists go rogue*, REUTERS (Jan. 25, 2017), <https://www.reuters.com/article/us-usa-trump-resist-idUSKBN15A0DI> [<https://perma.cc/2LA5-ES4H>].

50. Mindy Weisberger, "Rogue" Science Agencies Defy Trump Administration on Twitter, SCI. AM. (Jan. 27, 2017), <https://www.scientificamerican.com/article/ldquo-rogue-rdquo-science-agencies-defy-trump-administration-on-twitter/> [<https://perma.cc/7MFS-C52B>].

51. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 521 (2013).

52. Cf. David Lefkowitz, *On a Moral Right to Civil Disobedience*, 117 ETHICS 202, 211 (2007) (noting that "while anonymity is not strictly inconsistent with public disobedience, many observers may feel some tension between such conduct and the importance to the disobedient agent of demonstrating to her fellow citizens that she respects their equal moral claim to settle the form that morally necessary collective action ought to take").

53. See Frederick A. Elliston, *Civil Disobedience and Whistleblowing: A Comparative Appraisal of Two Forms of Dissent*, 1 J. BUS. ETHICS 23 (1982).

54. Other forms of bureaucratic resistance, by contrast, can be understood analogously to what Jessica Bulman-Pozen and David Pozen refer to as "uncivil obedience," which "requires that authoritative

government employees, the most salient binding directives come from within the executive branch itself.<sup>55</sup> As such, a government employee can be understood to engage in civil servant disobedience when she flouts an executive directive, whether in the form of a presidential order or an agency head edict.

On this front, Gillian Metzger and Kevin Stack advance the important position that such forms of intra-executive branch documents indeed constitute forms of law.<sup>56</sup> Specifically, Metzger and Stack define the category broadly to include “measures generated by agencies” as well as higher-level executive officials “to control their own actions and operations and aimed primarily at agency personnel.”<sup>57</sup> These pronouncements constitute law because they provide “at least a presumptively overriding (or presumptively primary) reason for action.”<sup>58</sup> In other words, civil servants generally feel “bound” to follow them, regardless of their perceived merit.<sup>59</sup> Understood accordingly, violations of internal agency directives are thus sufficient to constitute an act of civil servant disobedience, as defined here. Civil servant disobedience, in other words, occurs when a government employee flouts an internal agency or executive branch directive as a conscientious means of reform-minded protest.<sup>60</sup>

directives be followed rather than flouted, obeyed rather than disobeyed.” See Bulman-Pozen & Pozen, *supra* note 10, at 824 (observing behavior in context of administrative agencies).

55. One could also conceive of such disobedience arising as a response to actors external to the executive branch, such as a court. For example, a Customs and Border Patrol agent that reportedly continued to deport those from identified countries after the travel ban was enjoined by a court could be understood to be engaged in civil servant disobedience. See Betsy Woodruff, *Feds Blow Off Judge and Congressmen to Enforce Trump’s Order at Dulles*, DAILY BEAST (Jan. 30, 2017), <https://www.thedailybeast.com/feds-blow-off-judge-and-congressmen-to-enforce-trumps-orders-at-dulles> [<https://perma.cc/8TKN-JDEU>]. The defiance of judicial as opposed to executive orders, however, raises a host of distinct issues such as the premises of judicial supremacy that must be addressed another day. For related discussion, see Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008).

56. See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1244 (2017) (arguing “that many internal measures, ranging from substantive guidelines to management structures that allow for oversight of agency operations, qualify as forms of law”).

57. *Id.* at 1254.

58. *Id.* at 1257.

59. *Id.*

60. For those that reject this conception of law in favor of a more recognizable form, it is worthwhile noting that “political activity” by federally-funded employee while acting in an official capacity violates the positive law of the Hatch Act as well. Hatch Act, 5 U.S.C. §§ 7321–7326 (2012). See U.S. OFFICE OF SPECIAL COUNSEL, THE HATCH ACT: PERMITTED AND PROHIBITED ACTIVITIES FOR FEDERAL EMPLOYEES SUBJECT TO FURTHER RESTRICTIONS (Feb. 2016), <https://osc.gov/Resources/HA%20Poster%20Further%20Restricted%202016.pdf> [<https://perma.cc/MP59-PZQC>]. The Act was passed in 1939 to promote the nonpartisan administration of federal programs and to ensure merit-based advancement. *Id.* Its prohibitions are broad: political activity refers to “an activity directed towards the success or failure of a political party, candidate for partisan office or partisan political group.” 5 C.F.R. § 734.101 (2018). Thus, many perceived acts of civil servant disobedience may be categorized as potential

Finally, it is also useful to distinguish civil servant disobedience from what some philosophers have identified as “rule departures” by public officials.<sup>61</sup> On one view, a rule departure is “the deliberate decision by an official, for conscientious reasons, not to discharge the duties of her office.”<sup>62</sup> Examples include when police choose not to arrest an offender, or a decision by jury or judge to acquit an obviously guilty individual.<sup>63</sup> Some commenters argue that rule departure, unlike civil disobedience, does not require a breach of law and, as such, does not expose the dissenter to punishment.<sup>64</sup> While these concepts are matters of definition, rule departers appear to broadly cover both politically-appointed principals and agents: those with high-level discretion such as prosecutors and judges as well as line-officials such as police.<sup>65</sup>

By comparison, civil servant disobedience is uniquely concerned with those at the lowest levels of government hierarchy, and within administrative agencies in particular. In a sense, then, perhaps civil servant disobedience is a subset of rule departure. These refinements require a further note or two about civil servants as a category. In practice, the delineation is a nuanced one,<sup>66</sup> but for our purposes civil servants consist of those federal employees that undergo a merit-based hiring and selection process<sup>67</sup> and are only removable “for cause.”<sup>68</sup> They are not political appointees that cycle through government office, but rather remain through multiple administrations.

violations of the Hatch Act, thereby raising the question of whether and when such illegal behavior can be justified.

61. Brownlee, *supra* note 29.

62. *Id.*

63. *Id.* (citing Joel Feinberg, *Civil Disobedience in the Modern World*, in 2 HUMANITIES IN SOCIETY 37 (1979)).

64. *Id.*

65. For this reason, rule departures are also similar to what Adam Shinar deems “official resistance.” See Shinar, *supra* note 2, at 606. In Shinar’s account, “official resistance can only be practiced by public officials, which can include “elected officials, but it also encompasses nonelected officials, most notably administrators and members of the bureaucracy.” *Id.*

66. Indeed, the federal civil service consists of three categories: the merit-based competitive service, the Senior Executive Service (SES), and those who are “excepted” from merit-based restrictions. See Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 925–26 (2009). Of these categories, the first two consist almost entirely of career employees (the “almost” is because the SES “contains career employees as well as political officials, but political appointees can make up no more than 10 percent of the whole SES (or one-quarter of the SES slots in any one agency).” *Id.*

67. 5 U.S.C. § 2102(a)(1) (2012).

68. 5 U.S.C. §§ 7513(a), 7521(a)–(b) (2012); 5 U.S.C. § 4303 (2012). See Jason Marisam, *The President’s Agency Selection Powers*, 65 ADMIN. L. REV. 821, 863 (2013).

These characteristics, as we shall see, are important because of the distinct role that civil servants play in democratic administration.<sup>69</sup>

## II. EVALUATING CIVIL SERVANT DISOBEDIENCE

Just as accounts of civil disobedience ground themselves in an ideal conception of the polity, so too must those of civil servant disobedience. It is difficult to evaluate the practice, in other words, without a sense of the higher order principles at stake to guide the inquiry. Indeed, a major theme in the study of private civil disobedience has been its compatibility (or lack thereof) with a particular conception of liberal democracy.<sup>70</sup> To simplify this rich set of views, constitutional democracies rely on elected institutions for legitimacy subject to judicial review. Thus, the laws duly passed by legislatures, signed by the President, and affirmed by courts warrant obedience.

Civil disobedience, however, poses a destabilizing threat. Nevertheless, the liberal defense of civil disobedience posits that higher principles of free and equal citizenship impose limits on democratic authority. When majorities threaten minority rights, for example, civil disobedience is merited. In this view, such resistance is justified when democracies jeopardize the equal worth and basic liberties of their citizens.<sup>71</sup>

Might there be an analogous higher order conception of democratic *bureaucracy* to help guide the conditions, if any, under which civil servant disobedience is appropriate? Are there any principles one might look to in order to normatively evaluate when departures from those principles may justify behavior that might otherwise be prohibited? The first section explores this question, while the following sections focus on justificatory limitations on civil servant disobedience that result.

69. Within this category, there is also much variation worthy of further refinement in future work; some of the potential themes will only be alluded to here. For instance, it is likely that one may think differently about the normative obligations of lawyers versus government scientists versus policy analysts.

70. This liberal tradition is often associated with John Rawls and Jeremy Waldron, among others. RAWLS, *supra* note 22, at 363; Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

71. See Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1899 (2005) ("Importantly, political disobedience, on this liberal account, may properly be directed against even democratic laws and policies, because liberalism imposes limits on the authority even of democratic governments.").

*A. Internal Process-Perfection*

One natural starting point for a conception of the ideal bureaucracy might be found in the broader debate about how to justify the role of agencies in democratic societies. After all, civil servant disobedience heightens administrative law's already considerable anxieties. As agencies exercise power over private rights and liberties, scholars continue to search for ways in which to justify that coercion by unelected actors—when that power is exercised by those that lack a political appointment as well, the stakes rise.

The focus of the most prominent efforts to legitimate the administrative state thus far tend to emphasize what might be described as external, public-facing justifications: how the ways in which agencies interact with the public accord with various conceptions of democracy. Perhaps less appreciated is what these accounts have to say about an agency's internal operations. In what ways should organizational decision-making be structured to achieve the external results contemplated in ideal bureaucracies?

Strikingly, a close reading of the relevant scholarship reveals a conception of internal ordering which may help to vindicate different external justifications for the administrative state. Call it the *reciprocal hierarchy* of well-functioning bureaucracies. Hierarchies not only facilitate top-down control, but also bottom-up information-sharing. When this ideal is under siege, there is arguably space for legitimate civil servant disobedience, provided that other conditions are also met, as later discussed. In other words, when political appointees refuse to recognize the reciprocal nature of hierarchy, they delegitimize the role of bureaucracies in a democracy.

Take the civic republican concept of democracy, which privileges the role of deliberation between free and equal citizens. This model rejects the notion that government should “divide political spoils according to the pre-political preferences of interest groups,” and instead calls upon citizens to reconsider their preferences as they deliberate about the common good.<sup>72</sup> On Mark Seidenfeld's well-known account,<sup>73</sup> the administrative state is justified as the institution best situated to vindicate this vision. In particular, Seidenfeld emphasizes the “pyramidal structure of agencies.”<sup>74</sup> In his view, civil servants adhere to a “professional ethic” that facilitates outside participation and deliberation about matters that transcend pure politics. The

72. See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1514 (1992).

73. *Id.* at 1576.

74. *Id.* at 1559.



organization of agencies into divisions also creates more points of access for outside interest groups.<sup>75</sup> Most importantly, “[a]gency staff also can carry credible interest group concerns to the upper echelons of the agency and can carry agency responses back to the interest groups.”<sup>76</sup> In other words, a hierarchy that conveys citizen concerns up the chain to political leadership best serves the ideals of civic republicanism.<sup>77</sup> This reciprocal relationship between staff and appointees, that is, facilitates informed deliberation within and outside the agency.

Pluralist accounts of the administrative state similarly recognize the centrality of civil servants.<sup>78</sup> In the pluralist view, agencies allow self-interested bargaining between interest groups in the face of broad congressional delegations.<sup>79</sup> One strand of the pluralist view thus understands regulations as the means through which to distribute benefits and burdens. Another vein views interest-group competition as the optimal means of advancing the public interest through free-market-like mechanisms.<sup>80</sup> In each of these accounts, civil servants can facilitate bargaining between divergent interests as well as agency leadership. As the main points of contact between these outside groups and more transient appointees, staff can play an important role in facilitating the political market.

Yet another prominent justification for administrative agencies is their superior expertise relative to other policymaking bodies.<sup>81</sup> Expertise-based models rely on the specialized training and professionalism of civil servants to legitimate administrative power. A related view privileges the reign of “comprehensive rationality,” as exemplified by cost-benefit analysis and similar attempts to rationalize the policymaking process.<sup>82</sup> As the main practitioners of these methods, agency staff thus play an integral role. Agencies, in other words, must depend heavily on the civil service to satisfy

75. *Id.*

76. *Id.*

77. See Mark Seidenfeld, *The Role of Politics in A Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1445 (2013) (“[A]gency staff—interacting with the public and others in the executive branch in a non-political manner—can serve as republican guardians of regulatory action, and that the aim of the administrative state should be to foster deliberation and consensus among staff members responsible for agency rulemaking.”).

78. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1808–10 (1975).

79. *Id.*

80. See Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 343–56 (1974).

81. See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision Making*, 92 NW. U. L. REV. 173, 196–97 (1997) (calling these models “expertocratic”).

82. *Id.* (citing Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 396 (1981)).

the requirements of arbitrary-or-capricious review. These expert-driven concerns, in turn, must be funneled up the agency hierarchy in order to inform actual decisionmaking.

In this manner, different democratic justifications for the administrative state all recognize the role of civil servants in facilitating internal deliberation, interest-group access and expertise. Equally importantly, they celebrate the staff's ability to bring this learning and information to the agency's upper echelons. The idea of a reciprocal hierarchy is paramount. To review, the civic republican emphasis on deliberation depends heavily on a back-and-forth between career staff and appointees to vindicate its vision. The pluralist account similarly requires a pathway from civil servants and interest groups to political decisionmakers within the agency. Expert-driven justifications too require channels for information and data to help inform final decisionmaking.

The ideal of a reciprocal hierarchy, then, is core to any conception of democratic administration. Legitimate bureaucracies, in other words, must contain both mechanisms of authoritarian internal control—to facilitate accountability—as well as bottom-up information flow to incorporate deliberation, interest-group participation, or expertise. Indeed, this ideal is currently instantiated in practice through a number of mechanisms. Perhaps the clearest example is the presence of formalized clearance procedures in most, if not all, agencies. These processes require different offices and interests within an agency to review various agency actions before presented to the agency head for final sign-off.<sup>83</sup> In this manner, agency heads have a robust means of aggregating information and views within the agency.

When these channels of bottom-up information-sharing are blocked or otherwise impeded, however, the legitimacy of the bureaucracy falters on any account of democratic administration. Without a way for agency officials to access the opinions of career staff, in other words, these officials

83. To illustrate, when it comes to draft regulations, rule drafters within the Internal Revenue Service (IRS) must secure the approval of a branch reviewer; the Associate, Deputy, and Chief Counsels; the Assistant to the Commissioner; and, finally, the Commissioner before moving on to the Department of Treasury for final authorization. See INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 32.1.6.8.4 (2018), [https://www.irs.gov/irm/part32/irm\\_32-001-006#idm139647508295712](https://www.irs.gov/irm/part32/irm_32-001-006#idm139647508295712) [<https://perma.cc/WUF7-WULZ>]. Generally speaking, those in these clearance chains do not possess hard internal vetoes in the sense that they can unilaterally stop the rulemaking from proceeding. See Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 94 (2014) (“[O]ne government office ordinarily cannot authoritatively stop the issuance of a document by its sibling office.”). However, they can delay the draft rules by raising objections during the sign-off process. *Id.* (“[I]t is possible to give an office assigned a clearance role something very close to that power, by structuring the conflict resolution procedure so that it is the operational office that needs to ‘appeal’ a clearance denial.”).

are unable to take into account expert perspectives or those of long-standing interests. This bureaucratic ideal is also consistent with what Max Weber famously called bureaucracy's "rational-legal" claims to legitimacy.<sup>84</sup> In Weber's view, bureaucracies relied on lawlike rules that granted relative amounts of power to impersonal offices and structured their interactions accordingly. In this sense, "[o]bedience is owed to the legally established impersonal order."<sup>85</sup> This system of ordering is rationalized insofar as it depends on regularized rules and procedures to advance non-arbitrary action.<sup>86</sup> Importantly, Weber's ideal bureaucracy also privileged technical expertise.<sup>87</sup>

To be clear, the claim here is not that appointees must adopt the views of civil servants—they can (and often should) reject them altogether; rather, it is simply that consideration is due for administrative decision-making to be legitimate. Under these circumstances, when internal channels of deliberation are unavailable, there is more normative space to appeal directly to external political channels through civil servant disobedience. In this sense, the social practice can be understood as a form of bureaucratic process-perfection.

In considering this argument, it is useful to note its parallel with accounts of civil disobedience by private citizens. Daniel Markovits, for instance, argues that civil disobedience is justified as a means of unblocking political channels of protest, what he calls "democratic disobedience."<sup>88</sup> In his civic republican view, lawbreaking protest is essential to foster a thicker conception of active democratic engagement. Unlike the liberal narrative, his republican account aims to bolster democracy on its own terms, rather than as an appeal to an external set of higher principles for legitimation. Analogously, process-perfecting civil servant disobedience appeals to internal mechanisms within agencies themselves to help vindicate their democratic pedigree. By ensuring that administrative hierarchies are reciprocal, that is, civil servant disobedience may help to legitimate agency action.

Against this backdrop, consider numerous reports that the Trump Administration has violated the ideals of reciprocal hierarchy. Specifically,

84. MAX WEBER ET AL., *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 328 (1947).

85. See Helen Constan, *Max Weber's Two Conceptions of Bureaucracy*, 63 AM. J. SOC. 400, 401 (1958).

86. *Id.* See also Shinar, *supra* note 2, at 622; William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1225 (1983).

87. See WEBER ET AL., *supra* note 84.

88. Markovits, *supra* note 71, at 1949.

many agency heads have simply sidelined federal employees by not consulting them on important policy matters, and cutting them out of the decision-making process altogether. This appears to be most severe in the State Department<sup>89</sup> but is also reported in the Department of Veterans Affairs<sup>90</sup> and Environmental Protection Agency.<sup>91</sup> At the State Department, for example, then-Secretary Rex Tillerson apparently announced a so-called “FOIA Surge” to process a backlog of Freedom of Information Act requests. In order to do this, “prominent Ambassadors and specialized civil servants” were assigned to this rudimentary work, many of whom had worked on high priority issues under the Obama Administration.<sup>92</sup> Similarly, former Department of Interior Secretary Ryan Zinke reportedly “ordered the involuntary reassignment of dozens of the department’s most senior civil servants.”<sup>93</sup> Under these circumstances, the legitimacy of administrative action is imperiled.

### B. Further Conditions

At the same time, the reciprocal hierarchy is not without boundaries. That is, the lower ranks do not need to be consulted unless the relevant authorizing statutes demand expertise and information that civil servants uniquely possess. Evidence of such demand can often be found in the internal clearance processes described earlier. For example, a statute mandating the “best available technology” usually requires input from agency engineers and professionals.<sup>94</sup> The EPA, for example, has an extensive technical clearance process for internal scientific reports to inform regulations issued

89. See Julia Ioffe, *The State of Trump’s State Department*, THE ATLANTIC (Mar. 1, 2017), <https://www.theatlantic.com/international/archive/2017/03/state-department-trump/517965/> [https://perma.cc/28G7-2RJB] (describing State Department employees as “adrift and listless” and noting that they are shut out of meetings with foreign leaders and not consulted for policy advice).

90. Lisa Rein, *Exodus from Trump’s VA: When the mission of caring for veterans ‘is no longer a reason for people to stay’*, WASH. POST (May 3, 2018), [https://www.washingtonpost.com/politics/who-wants-to-work-there-now-trumps-ronny-jackson-fiasco-may-be-the-least-of-vas-worries/2018/05/02/e1c64af0-44cf-11e8-8569-26fda6b404c7\\_story.html?utm\\_term=.e6d68712ad4e](https://www.washingtonpost.com/politics/who-wants-to-work-there-now-trumps-ronny-jackson-fiasco-may-be-the-least-of-vas-worries/2018/05/02/e1c64af0-44cf-11e8-8569-26fda6b404c7_story.html?utm_term=.e6d68712ad4e) [https://perma.cc/2XPZ-M7MF] (reporting on an “exodus” where about forty senior staffers have left the agency since the beginning of the year, with most citing being sidelined as major reasons for departure).

91. Jeff Tollefson, *Science under siege: behind the scenes at Trump’s troubled environment agency*, NATURE (July 12, 2018), <https://www.nature.com/articles/d41586-018-05706-9> [https://perma.cc/6FQA-VJDM] (noting that “Pruitt and his senior political appointees . . . rarely consult with career scientists,” increase “the risk of weakening the EPA’s defence in the many lawsuits that states and environmental groups were filing against the agency”).

92. *Id.*

93. *Id.* See Kitrosser, *supra* note 4.

94. See Magill & Vermeule, *supra* note 2.

under such statutes.<sup>95</sup> If an EPA Administrator disregarded or doctored the results of such process, then the agency scientist may be more justified in defying orders not to make such reports public, as further discussed below.

By contrast, agency staff would not be justified in openly flouting directives under statutes that clearly afford political appointees unreviewable discretion. Of course, the lines between so-called political and expert determinations are famously contested,<sup>96</sup> but the exercise here is one of identifying the relevant underlying principles.<sup>97</sup> The general idea behind this condition is to recognize the duly circumscribed role for civil servants in the policymaking process. Put differently, the ideal of a reciprocal hierarchy privileges bureaucratic deliberation as legislatively authorized.

While a violation of the reciprocal hierarchy provides a basis for disobedience, it is not a sufficient one. There are also other important conditions to consider when assessing whether any particular instance of civil servant disobedience is justified. These conditions exhibit civil servant disobedience's fidelity to law, despite its law-breaking premise. Uniting them, in other words, is their "constraining commitment to state authority,"<sup>98</sup> despite the necessity of challenging it to ultimately vindicate higher principles. Indeed, "[a]t the heart of most every conception of civil disobedience . . . is the paradox of law-breaking that is, at the same time, law-respecting."<sup>99</sup> Civil servants may sometimes have to break the law to ultimately preserve its legitimacy.

Accordingly, civil servant disobedience should be a measure of last resort. This condition draws upon a robust debate about the extent to which private civil disobedience must fulfill this condition as well as what that requirement means in practice. One view holds that democratic citizens have an obligation to follow the law to the extent possible, including using the appropriate legal channels of dissent before resorting to illegal ones.<sup>100</sup> Only after attempts to pursue lawful means have failed does the potential legitimacy of civil disobedience arise. Analogously, it is important not only to the rule of law, but also to the ideal of hierarchical reciprocity that career

95. U.S. ENVTL. PROT. AGENCY, BEST PRACTICES FOR CLEARANCE OF SCIENTIFIC PRODUCTS AT EPA (May 2018), [https://www.epa.gov/sites/production/files/2018-05/documents/best\\_practices\\_for\\_clearance\\_of\\_scientific\\_products\\_at\\_epa\\_final\\_21may2018.pdf](https://www.epa.gov/sites/production/files/2018-05/documents/best_practices_for_clearance_of_scientific_products_at_epa_final_21may2018.pdf) [<https://perma.cc/CQH8-QJVJ>].

96. See, e.g., CHRISTOPHER F. EDLEY, ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 91 (1990) (discussing why "politics" and "science" are "conceptually problematic" categories).

97. See *infra* Section III.A.

98. See Bulman-Pozen & Pozen, *supra* note 10, at 814.

99. *Id.*

100. RAWLS, *supra* note 22, at 373.

staff abide by what measures already exist to express dissent or protest before engaging in public disobedience.

These measures include channels not only within the agency, but also the executive branch more broadly. First, within the agency, civil servants should elevate the matter to a higher-level appointee. Doing so fulfills the ideal of a reciprocal hierarchy insofar as the relevant information is now being shared with someone who possesses higher-level decision-making authority. This condition also coheres with various guidelines regarding legal and scientific ethics. The model rules of professional conduct for lawyers, for example, state that government lawyers observing illegal conduct may “refer the matter to higher authority in the organization” as long as doing so is in the best interests of the organization.<sup>101</sup> Agency-specific scientific integrity policies also stress that scientific disagreements “be resolved during internal deliberations” or “peer review” when available.<sup>102</sup> The EPA’s scientific integrity policy, for instance, identifies an internal reporting mechanism to the agency’s own Scientific Integrity Official, Deputy Scientific Integrity Officials, or the Office of Inspector General.<sup>103</sup>

Indeed, Inspectors General (IGs) currently exist by statute in about seventy-two executive agencies.<sup>104</sup> Their stated purpose “is to create independent and objective units within each agency whose duty it is to combat waste, fraud, and abuse in the programs and operations of that agency.”<sup>105</sup> While they are removable at will, they enjoy heightened procedural protections and operate under norms of independence.<sup>106</sup> Each IG is also authorized to receive whistleblower complaints from agency employees and must strive to preserve anonymity when possible.<sup>107</sup> Through investigations and audits, IGs then prepare public reports for Congress and agency heads reporting their findings.

When reporting misconduct or illegality, civil servants also have other avenues to make the behavior known. For example, they could approach the Office of Special Counsel and expect confidentiality. While OSC does not

101. MODEL RULES OF PROF’L CONDUCT r. 1.13(b) (AM. BAR. ASS’N 2016). *See also* Adam J. White, *Ethics in the Executive Branch: The Constitutional Need to Preserve Presidential Energy*, 22 TEX. REV. L. & POL. 257, 260. (2017).

102. U.S. ENVTL. PROT. AGENCY, SCIENTIFIC INTEGRITY POLICY (2012), [https://www.epa.gov/sites/production/files/2014-02/documents/scientific\\_integrity\\_policy\\_2012.pdf](https://www.epa.gov/sites/production/files/2014-02/documents/scientific_integrity_policy_2012.pdf) [<https://perma.cc/5PWN-PD92>].

103. *Id.*

104. COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GENERAL (July 14, 2014), [https://ignet.gov/sites/default/files/files/IG\\_Authorities\\_Paper\\_-\\_Final\\_6-11-14.pdf](https://ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf) [<https://perma.cc/M349-CM83>].

105. *Id.*

106. *Id.* at 9.

107. *Id.*

have investigative authority, it could order an agency to investigate the claim and submit a report on the reasonableness of that investigation to Congress and the President. Should the employee suffer retaliation, there are also various processes available, which can involve OSC and/or the Merit Systems Protection Board, or else a union-protected grievance procedure usually involving private arbitrators.

Given these alternative channels of dissenting in pursuit of potential reform, it is only when these channels have been exhausted or are otherwise compromised that normative space for civil servant disobedience potentially exists. Some in the civil disobedience context argue that the condition of last resort is a necessary one, though others regard it only as a presumption.<sup>108</sup> Some also recognize that the condition need not be absolute nor impractical: “[I]f past actions have shown the majority immovable or apathetic, further attempts many reasonably be thought fruitless.”<sup>109</sup> In other words, potential dissidents need not continue appealing hopelessly to those in power before considering civil disobedience. The same holds true in the civil servant context: If intra-executive branch appeals are pointless or ignored, then civil servant disobedience becomes more valid.

Relevantly, the Trump Administration has currently left many high-level political appointments vacant. So too with IG positions at many high-profile agencies, including the Department of Defense, Department of Interior, Environmental Protection Agency, and Central Intelligence Agency.<sup>110</sup> The Merit Systems Protection Board has lacked a quorum for the longest period in its history. As institutionalized channels of dissent become less available, the more appeals to the external political process may be justified.

Relatedly, when civil servants resort to disobedience, they must also do so in ways that accord with the professional norms at the core of bureaucratic legitimacy. Professionals like scientists, policy analysts, and lawyers are governed by independent, expert-driven norms into which they have been socialized and educated.<sup>111</sup> These norms, in turn, are often sustained through peer review and professional association. Indeed, as discussed above, professional expertise has often been invoked as an independent justification

108. RAWLS, *supra* note 22, at 373.

109. *Id.*

110. See *Tracking how many key positions Trump has filled so far*, WASH. POST, [https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/?utm\\_term=.fa6edc95d809](https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/?utm_term=.fa6edc95d809) [https://perma.cc/KL3J-ZELR].

111. Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 592–93 (2011).

for the administrative state.<sup>112</sup> Thus, civil servant disobedience with little connection to subject-specific training is illegitimate. For example, some Department of Labor (DOL) employees wrote a public letter to protest appointee Andrew Puzder based on his prior business practices and perceived lack of respect for low-wage workers and women.<sup>113</sup> Many rightly perceived a violation of merit principles, however, given that the grounds for criticism were not clearly connected to any specialized perspective offered by DOL civil servants.<sup>114</sup>

Finally, civil servants who disobey must be willing to accept the legal consequences of their actions.<sup>115</sup> The willingness to do so helps to establish the behavior as credibly sincere and conscientious. In addition, acquiescence to punishment demonstrates one's overall commitment to the rule of law. Instead of being perceived as a mere gadfly, a readiness to submit to legal punishment expresses one's respect for stability and legal ordering. It can also make those in power realize the magnitude of the stakes involved—what for them may have been a minor issue takes on a greater significance once people go to jail or are otherwise punished for it.<sup>116</sup>

Given the Supreme Court's governing precedents, note that it is unlikely that civil servant disobedience is protected by the First Amendment in most instances.<sup>117</sup> While government employees do not relinquish all of their First Amendment rights at the agency's door,<sup>118</sup> the Court has made clear that the government has broad powers to restrict employee speech.<sup>119</sup> The government has an important interest in managing an efficient and orderly workplace. That interest, however, can be narrowly balanced against an employee's right to speak out on matters of "public concern."<sup>120</sup> What

112. See, e.g., J. LANDIS, *THE ADMINISTRATIVE PROCESS* 23–24 (1938).

113. See Joe Davidson, *Labor Dept. employees urge vote against Puzder nomination*, WASH. POST. (Feb. 14, 2017), [https://www.washingtonpost.com/news/powerpost/wp/2017/02/14/labor-dept-employees-urge-vote-against-puzder-nomination/?utm\\_term=.2c0d0690af75](https://www.washingtonpost.com/news/powerpost/wp/2017/02/14/labor-dept-employees-urge-vote-against-puzder-nomination/?utm_term=.2c0d0690af75) [https://perma.cc/2WJH-9DPB] (noting that the letter stated that "three specific factors disqualify Mr. Puzder from serving as the head of an agency whose primary mission is to protect America's workforce: (1) Mr. Puzder's own business practices; (2) his derisive public comments about his restaurants' employees and other low-wage workers; and (3) his equally troubling public comments and behavior towards women").

114. See Michael Wald, *Labor Department Employees Urge Vote Against Puzder Nomination . . . But Should They?*, FEDSMITH (Feb. 15, 2017), <https://www.fedsmith.com/2017/02/15/labor-department-employees-urge-vote-against-puzder-nomination-but-should-they> [https://perma.cc/2MBS-QZX6].

115. RAWLS, *supra* note 22, at 366; Bulman-Pozen & Pozen, *supra* note 10, at 817.

116. SINGER, *supra* note 22, at 84.

117. See Ronald J. Krotoszynski, Jr., *Whistleblowing Speech and the First Amendment*, 93 IND. L.J. 267, 286 (2018).

118. See, e.g., *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 605–06 (1967).

119. See *Waters v. Churchill*, 511 U.S. 661, 671–72 (1994) (plurality opinion).

120. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).



constitutes a matter of public concern is, however, “not well defined”<sup>121</sup> with courts looking to the “content, form, and context of a given statement, as revealed by the whole record,” in order to determine when it is implicated.<sup>122</sup>

Even when government employee speech relates to a matter of public concern, the Court has also held that First Amendment protection does not extend to speech made in the course of work-related duties.<sup>123</sup> The *Garcetti* Court explained that “[a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.”<sup>124</sup> In other words, even if an employee speaks on public matters, if the speech is work-related, the speech is not constitutionally protected. All in all, “the contemporary Supreme Court has limited quite significantly the constitutional protections available to government employees who wish to call attention to misconduct or inefficiency in government operations.”<sup>125</sup> Because civil servant disobedience must be expressed in an official capacity by definition, it is therefore unlikely to enjoy First Amendment protection under existing precedents.

\*\*\*

To summarize thus far, legitimate civil servant disobedience may arise when the conditions of reciprocal hierarchy have been violated under statutes that can be read to require the information civil servants are uniquely situated to provide. Such disobedience is only legitimate when it adheres to professional norms, is used as a measure of last resort, and is exercised in contemplation of the legal consequences. Many of these principles are undoubtedly not straightforward in application; again, the project here has been to identify the relevant evaluative factors. These normative limitations may actually mean that very little civil servant disobedience is justified in practice.

121. *San Diego v. Roe*, 543 U.S. 77, 83 (2004); *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). *See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985).

122. *Connick v. Myers*, 461 U.S. 138, 147–48 (1983). In *Rankin v. McPherson*, 483 U.S. 378, 380 (1987), the Court applied this standard and found that a comment (“if they go for him again, I hope they get him”) made by a clerical employee in a constable’s office about the attempted assassination of the President of the United States implicated a matter of public concern as it was made in the course of a conversation regarding the policies of the President.

123. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

124. *Id.*

125. Krotoszynski, Jr., *supra* note 117.

*C. Grounds for Disobedience*

Now for perhaps the hardest question, one that most requires further debate after the initial exploration here: on what substantive basis is civil servant disobedience legitimate? The ideal of a reciprocal hierarchy suggests procedural conditions that, when violated, may justify defiance. The ideal recognizes the importance of internal bureaucratic deliberation of the kind contemplated by authorizing statutes and agency procedures established accordingly. But what are the substantive grounds for legitimate disobedience? In other words, on what basis is it appropriate for civil servants to resist?

These questions underscore the stakes involved. On the one hand, agency heads are the most politically accountable actors at the agency, especially if they are removable at will. They are usually appointed by the President who has the constitutional duty to “take care” that the laws are “faithfully executed,”<sup>126</sup> and confirmed by the Senate.<sup>127</sup> Agency heads, not career staff, are delegated authority, by Congress.<sup>128</sup> Civil servants, by contrast, are unelected. Some empirical evidence suggests they have liberal tendencies as a group, though their preferences vary by agency.<sup>129</sup> Allowing for disobedience may result in misplaced ideological tensions in the guise of principled action. Furthermore, once an agency head has made a final decision, obedience is necessary to ensure efficient and effective action. Open disobedience, by contrast, threatens disruption and distraction.

On the other hand, agency heads can make decisions that violate scientific integrity, the law, or morality.<sup>130</sup> Many of these choices can be easily shielded from public scrutiny. Civil servants, however, are well-placed to know of these potential deficiencies. The question of disobedience, then, raises difficult tensions: between managerial imperative and legitimate bureaucratic action; between efficient agency functioning and constrained governmental power. Normative conclusions about how to resolve these tensions must balance these competing concerns.

126. U.S. CONST. art. II, § 3.

127. *Id.* § 2.

128. See Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 277, 284–91 (2006) (discussing “simple delegations,” “delegations to executive officials”).

129. David E. Lewis, “Deep State” Claims and Professional Government, REG. REV. (Dec. 5, 2017), <https://www.theregreview.org/2017/12/05/lewis-deep-state-professional-government/> [https://perma.cc/L6L6-UQG3].

130. Of course, the distinctions between some of these categories are deeply contested, as later discussed. See *infra* notes 156–162 and accompanying text.

One way to do so may be to permit internal defiance only when an executive violation of some relevant value—such as scientific integrity, legality or morality—is “clear.” Allowing disobedience from clear breaches of the relevant principles may reduce the risk of erroneous agency disruption, while at the same time vindicating values for which there is a broad social consensus. To be sure, there is enormous criticism about how to apply this criterion—clarity—in practice.<sup>131</sup> But it is worth observing that the criterion already forms the basis for many justificatory accounts of related social practices.

Take, for example, debates over military disobedience—the question of when members of the armed forces can or should refuse to comply with a direct order.<sup>132</sup> The military, even more so than the bureaucracy, demands obedience and expedient execution. In the Supreme Court’s words, the “army is not a deliberative body,” but rather “the executive arm. . . . Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other.”<sup>133</sup> Military obedience, much more so than in the bureaucracy, can mean the difference between life or death.

Even in this context, however, soldiers are not expected to obey all orders from their superiors. To the contrary, they are legally required to disobey orders that are “patently” or “manifestly” illegal.<sup>134</sup> Failing to disobey such orders can result in criminal sanctions.<sup>135</sup> This rule has a long historical pedigree dating to the military law of ancient Rome; it is also reflected in the Nuremberg Tribunal Charter’s declaration that action “pursuant to order of his Government or of a superior shall not free him from responsibility.”<sup>136</sup> In other words, military subordinates must obey orders unless doing so would clearly violate the law.

Military courts and observers have attempted to flesh out the standard in a number of ways. One observer, for example, describes clearly illegal orders as those that do not require “situational judgment.”<sup>137</sup> Such orders, in

131. See, e.g., Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

132. See Mark J. Osiel, *Obedying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CALIF. L. REV. 939 (1998).

133. *In re Grimley*, 137 U.S. 147, 153 (1890).

134. See CHRISTOPHER FONZONE, WHAT THE MILITARY LAW OF OBEDIENCE DOES (AND DOESN’T) DO (Mar. 2018), [https://www.acslaw.org/issue\\_brief/briefs-landing/what-the-military-law-of-obedience-does-and-doesnt-do/](https://www.acslaw.org/issue_brief/briefs-landing/what-the-military-law-of-obedience-does-and-doesnt-do/) [<https://perma.cc/9Q8T-JGV5>].

135. *Id.* at 7.

136. *Id.* at 6 (citations omitted); Petty, *supra* note 4, at 103.

137. See Osiel, *supra* note 132, at 971.

other words, are illegal regardless of the given circumstances.<sup>138</sup> Others call such orders illegal “on their face,” leaving no need to “reason why” the order is unlawful.<sup>139</sup> This clarity requirement attempts to strike a balance: on the one hand, it recognizes that the need for military discipline is not absolute; after all, national security itself can be served by respecting the supremacy of law.<sup>140</sup> On the other hand, the clarity requirement also recognizes that legal supremacy is also not absolute; the rule thus forgives illegal behavior that is minor or that seemed legal at the time and therefore not “clearly” illegal.<sup>141</sup>

Examples of orders found to be clearly illegal may help to illustrate the requirement’s narrow scope. Take the famous case involving First Lieutenant William Calley, who claimed that he was merely following orders when leading troops to kill innocent civilians in the Vietnamese village of My Lai.<sup>142</sup> Calley argued that the trial judge had applied too high a standard in instructing the jury to ask “whether a man of ordinary sense and understanding” would know that the order was unlawful under the circumstances. Calley instead sought a more forgiving standard, which the court rejected.<sup>143</sup> In upholding the guilty verdict, the U.S. Court of Military Appeals declared: “An order to kill infants and unarmed civilians who were so demonstrably incapable of resistance to the armed might of a military force” was “so palpably illegal” that the standard applied did not matter. Other cases involving “clearly” illegal orders similarly feature demands to shoot individuals, including a wounded trespasser and a prisoner.<sup>144</sup>

While illegality by executive officials is unlikely to present such extreme scenarios, clearly unlawful orders may also be a compelling basis for civil servant disobedience.<sup>145</sup> Legal supremacy is a central bureaucratic value, as Weber recognized years ago.<sup>146</sup> While the military context often invokes the international laws of war,<sup>147</sup> the case for bureaucratic defiance is likely strongest when the executive branch defies a legal conclusion reached

138. *Id.*

139. FONZONE, *supra* note 134, at 9.

140. *Id.* at 8.

141. *Id.*

142. *See* United States v. Calley, 48 C.M.R. 19 (1973); Petty, *supra* note 4, at 104.

143. *Calley*, 48 C.M.R. at 22.

144. United States v. Kinder, 14 C.M.R. 742, 750 (A.F.B.R. 1954); United States v. Griffen, 39 C.M.R. 586 (A.B.R. 1968). These two cases are discussed and cited in FONZONE, *supra* note 134, at 9.

145. *See* Ingber, *supra* note 4, at 203–04.

146. *See* WEBER ET AL., *supra* note 84.

147. FONZONE, *supra* note 134, at 9; Osiel, *supra* note 132.

with finality by the Supreme Court.<sup>148</sup> The harder cases arise when the Supreme Court has not yet adjudicated the precise legal question, or when there is still disagreement among lower courts. Indeed, government lawyers have long struggled with identifying the “client” to whom ethical duties are owed: her agency, the executive branch, courts or the public.<sup>149</sup>

It is tempting here to draw from the context of qualified immunity, in which a government official is subject to liability if found violating a “clearly established” law.<sup>150</sup> As many have noted, this inquiry is remarkably difficult to render precise.<sup>151</sup> The Supreme Court, however, has stated that a clear law does not require “a case directly on point,” but “existing precedent must have placed the statutory or constitutional question beyond debate.”<sup>152</sup> In addition, the law cannot “be defined at a high level of generality,” but rather “must be particularized to the facts of the case.”<sup>153</sup> Perhaps these efforts to define “clearly established” law can provide some traction for determining when an executive official has violated such a law, in which case civil servant disobedience is more likely to be justified.<sup>154</sup> Some have also promisingly

148. Cox, *supra* note 32.

149. The norm expressed in model rules seems to suggest the government lawyer’s primary duty is to her immediate agency head. See White, *supra* note 101. See also MODEL RULES OF PROF’L CONDUCT r. 1.13(a) (AM. BAR. ASS’N 2016) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”). When agency officials are “clearly” acting in violation of law, however, the rules seem to contemplate elevation to higher level officials and eventually the public. Specifically, the ethical rules contemplate situations when a government lawyer “knows” that her client is “engaged in action” that is “a violation of law . . . likely to result in substantial injury to the organization.” *Id.* at 1.13(b). Under those circumstances, the lawyer may “refer the matter to higher authority in the organization” if doing so is in the best interests of the organization. *Id.* Should the higher authority fail to respond in a “timely and appropriate” matter, the lawyer may then “reveal information relating to the representation” if doing so will prevent “substantial injury” to the agency.” *Id.* at 1.13(c). In other words, the model rules appear to encourage public disclosure of a client’s illegal acts. The problem of civil servant disobedience, however, arises when precisely in the areas when the law is not “clear.”

150. There, the relevant inquiry is whether it would be “clear to a reasonable official that his or her conduct was unlawful in the situation he or she confronted.” See *Saucier v. Katz*, 533 U.S. 194 (2001). It is also worth considering the ways in which other “clarity doctrines” operate, such as in the context of applying *Chevron*, avoidance, lenity, and the good faith exception to the exclusionary rule. See Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3327038](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327038) [<https://perma.cc/6CVZ-ZNX3>] (arguing that “the goals of any given clarity doctrine should and often do dictate the form of clarity sought under that doctrine”).

151. See, e.g., Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814 (2018) (describing the Supreme Court’s vacillation in defining what constitutes a “clearly established” law); Michael S. Catlett, *Clearly Not Established: Decisional Law And The Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1041 (2005) (noting the Supreme Court’s failure to articulate consistent guidelines for lower courts engaged in qualified immunity analysis).

152. *Kisela v. Hughes*, 138 S. Ct. 1148 (2018).

153. *White v. Pauly*, 137 S. Ct. 548 (2017).

154. It is possible that the bureaucratic context could require less clarity in principle than in the military arena due to the different tradeoffs involved.

suggested that the doctrine may encourage parties to seek and rely on expert legal opinions.<sup>155</sup> Indeed, the more that civil servants seek out legal opinions from inside and outside the executive branch before taking matters into their hands, the less likely it is for unjustified disobedience to occur.

That said, focusing solely on legalism threatens to drain the moral resonance of civil disobedience more generally.<sup>156</sup> Legalism reduces the convictions of civil disobedience to a thin account of rule-following.<sup>157</sup> It also fails to address what William Simon has called the “nightmarish slippery slope” of legal positivism, which blesses “compliance with jurisdictionally adequate but morally evil laws like the Nazi enactments requiring reporting Jews.”<sup>158</sup> The issue is whether there is also a legitimate basis for bureaucrats to disobey morally repugnant edicts from superiors, even if they comply with duly-passed laws.<sup>159</sup>

While a full treatment of this nuanced question will not be attempted here, a few observations may be relevant.<sup>160</sup> First, to the extent disagreements about morality can be understood in terms of conflicting comprehensive doctrines,<sup>161</sup> the potential for irreducible intra-agency conflict is high. Moral conflicts understood as such threaten order and stability—even more so than legal disputes where authoritative institutions exist to settle them. Civil servant disobedience on this basis is thus perilous. If immorality, however, is instead understood as violations of universal

155. Re, *supra* note 150, at 31 (citing Edward C. Dawson, *Qualified Immunity for Officers' Reasonable Reliance on Lawyers' Advice*, 110 NW. U. L. REV. 525 (2016)).

156. See Zashin, *supra* note 33, at 297–300.

157. *Id.* at 287 (citing JUDITH SHKLAR, *LEGALISM* (1964)).

158. William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 224 (1996).

159. While referencing the positivist view, this discussion acknowledges that the “separability” of law and morality has been a long-running debate between positivists and natural law theorists in jurisprudence. See, e.g., AUGUSTINE, *ON FREE CHOICE OF THE WILL* 8 (Thomas Williams trans., Hackett Publ'g Co. 1993) (“[A]n unjust law is no law at all.”); Lon L. Fuller, *Positivism and Fidelity to Law—a Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) (1961); Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 5 (2011); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1957).

160. A more sophisticated treatment could grapple with a number of rich philosophical and jurisprudential debates these questions implicate. See, e.g., Philippe Nonet, *What Is Positive Law?*, 100 YALE L.J. 667, 669 (1990); Connie S. Rosati, *Is There A “Higher Law”? Does It Matter?*, 36 PEPP. L. REV. 615, 617 (2009).

161. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993); Charles A. Kelbley, *Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality*, 72 FORDHAM L. REV. 1487, 1491–92 (2004) (“Rawls’s political conception of justice necessarily distances itself from comprehensive doctrines. These doctrines, of a religious, moral, or philosophical nature, are more or less comprehensive insofar as they embrace positions on all values, or at least on a wide spectrum of values. Various religions, philosophies, and moral theories are standard examples of comprehensive doctrines.”).

shared values,<sup>162</sup> then disobedience of immoral orders may be better justified. When conceptions of morality are widely known and held, bureaucratic disobedience may be warranted and also less prone to error and distraction. Note that this approach is similar to an account based on clear illegality: both are grounded in duly recognized breaches of moral or legal norms.

### III. IMPLICATIONS

This Part now considers an alternative to civil servant disobedience—resignation—as well as the potential impacts of the social practice on the administrative state more broadly.

#### *A. The Exit Objection*

Perhaps the strongest objection to civil servant disobedience is that civil servants, unlike private citizens, can and should exit the objectionable entity. Resigning, in this view, allows accountable actors to maintain control and is less disruptive to the workplace than disobedience. Resigning is the only legitimate way for civil servants to resist, lest the unitary executive be compromised and managerial chaos ensue. While this argument undoubtedly has force, a closer examination suggests a more complicated assessment.<sup>163</sup>

First, consider that civil servants are required to take oaths not to the President, but rather to support and defend the Constitution.<sup>164</sup> Witnessing unconstitutional directives and then resigning—knowing that one's replacement would simply carry them out—could be understood as a violation of one's constitutional fidelity. Second, Congress' numerous whistleblower statutes suggests the legislative desire to protect disclosures, rather than encourage withdrawals. These statutes explicitly prohibit adverse personnel actions “for refusing to obey an order that would require the

162. Cf. Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 414 (1984) (observing shared “virtues” found in the Universal Declaration of Human Rights); JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (2013).

163. See JENNET KIRKPATRICK, *THE VIRTUES OF EXIT: ON RESISTANCE AND QUITTING POLITICS* (2017).

164. 5 U.S.C. § 3331 (2012) (“An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: ‘I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.’ This section does not affect other oaths required by law.”).

individual to violate a law.”<sup>165</sup> In other words, Congress has sought to encourage, rather than discourage, disobedience despite the potential costs to agency management.

Insofar as the interests of agency managers are at stake, resignations can also be just as disorderly, if not more so, than defiance. Jennet Kirkpatrick, for instance, discusses numerous species of exits from political organizations. Exits, especially when they are en masse can be “expressive” exits: the departures alone are communicative acts that can depress agency morale.<sup>166</sup> Exits can also be “resistant,” that is, “the person or group” can use “the departure or the safety that it affords to oppose dominant power relations” within the organization from the “outside.”<sup>167</sup> Resistant exits can thus result in more disruption to the organization in the longer term.

Finally, it is also worth noting that resignation is not as costless to civil servants, as it might be to political appointees. Because many civil servants entered government service expecting to build their careers there, they may lack the networks and resources to be able to transition easily into new positions. As a result, they might not have as many alternate employment options as the revolving door narrative may otherwise suggest. For all these reasons, the case for resignation is mixed, especially when balanced against the threat of illegal governmental coercion.

### *B. Backlash*

Public resistance of the kind exemplified by civil servant disobedience has its merits, among them transparency and the opportunity for political contestation. As Bijal Shah rightly emphasizes, the phenomenon can also raise important “fire alarms” inviting greater legislative and judicial oversight.<sup>168</sup> In other words, civil servant disobedience can signal the presence of illegal behavior that may have otherwise gone unchecked. But civil servant disobedience also has other consequences, some unintended.<sup>169</sup> One is the inevitable crackdown from above. As David Hume observed,

165. 5 U.S.C. § 2302(b)(9)(D) (2012). See JON O. SHIMABUKURO & L. PAIGE WHITAKER, WHISTLEBLOWER PROTECTIONS UNDER FEDERAL LAW: AN OVERVIEW (Sept. 2012), <https://fas.org/sgp/crs/misc/R42727.pdf> [<https://perma.cc/U3XD-UWFY>].

166. KIRKPATRICK, *supra* note 163, at 18–19.

167. *Id.* at 20.

168. Bijal Shah, *Civil Servant Dissonance & Alarm*, 94 CHI.-KENT L. REV. (forthcoming 2019) (manuscript at 21–23) (on file with author).

169. Relatedly, there are also potential unintended consequences of analyzing the phenomenon of civil servant disobedience at all. Doing so explicitly may invite more ill-considered and unjustified attempts to resist executive orders than would have otherwise occurred. I thank Jeremy Rabkin for pressing this point.



“where a disposition to rebellion appears among any people, it is one chief cause of tyranny in the rulers, and forces them into many violent measures which they never would have embraced.”<sup>170</sup> In other words, overt uprisings can stoke even stronger authoritarian impulses.

Consider the following actions by the Trump Administration thus far:

- President Trump signed the Department of Veterans Affairs Accountability and Whistleblower Protection Act.<sup>171</sup> The act erodes the due process safeguards of all VA employees by decreasing the time staffers have to respond to adverse actions such as suspensions, demotions, and firings to seven business days. The Act also lowers the burden of proof required for management allegations against employees (from a “preponderance of evidence” to “substantial evidence”).<sup>172</sup>
- In May 2018, Trump issued three executive orders concerning the civil service. The Executive Order Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles, for example, expedites the process of firing and disciplining federal employees.<sup>173</sup>

Reflecting on this state of affairs, one worries about the longer term consequences of civil servant disobedience and its inevitable presidential backlash. The potential for mutually respectful, reciprocal progress is instead being squandered for mutually assured destruction to the long-cultivated norms of professionalism that have defined the civil service.<sup>174</sup> To be sure, destruction is what President Trump has confessed to want. But the institution of the presidency also stands to be weakened in the long term.

170. DAVID HUME, *THE PHILOSOPHICAL WORKS OF DAVID HUME* 519 (1854).

171. Pub. L. No. 115-41, 132 Stat. 862 (codified in scattered sections of 38 U.S.C.). See also Joe Davidson, *New VA Law sets stage for government-wide cut in civil-service protections*, WASH. POST (June 20, 2017), [https://www.washingtonpost.com/news/powerpost/wp/2017/06/21/new-va-law-sets-stage-for-government-wide-cut-in-civil-service-protections/?noredirect=on&utm\\_term=.54923c4581f0](https://www.washingtonpost.com/news/powerpost/wp/2017/06/21/new-va-law-sets-stage-for-government-wide-cut-in-civil-service-protections/?noredirect=on&utm_term=.54923c4581f0) [<https://perma.cc/KA9B-JT9Q>].

172. *Id.*

173. Exec. Order No. 13,839, 83 Fed. Reg. 25,343 (May 25, 2018). Now, performance is considered above seniority in determining who to retain during reduction in force (RIF) layoffs, poor performers and those accused of misconduct are now allotted only a thirty day grace period for improvement (in contrast to a prior grace period of up to 120 days). Agencies are also permitted to consider all of an employee’s past misconduct and not just similar past misconduct when conducting disciplinary action.

174. See WILLIAM G. RESH, *RETHINKING THE ADMINISTRATIVE PRESIDENCY: TRUST, INTELLECTUAL CAPITAL, AND APPOINTEE-CAREERIST RELATIONS IN THE GEORGE W. BUSH ADMINISTRATION* (2015) (arguing that mutual support based on optimistic trust is a more effective managerial strategy than fragmentation).

Policies that the president favors will not be as informed nor as effectively executed as they otherwise could have been. Going forward, there will thus be an important need to rebuild trust between the bureaucracy and its political superiors.

### CONCLUSION

Civil servant disobedience has been a notable feature of the administrative state under the Trump Administration. The bureaucracy has been openly challenging decisions made by its political appointees. This article has sought to isolate the phenomenon conceptually and begin an exploration into its normative implications. One of its contributions has been to consider an ideal of bureaucratic process—the reciprocal hierarchy—that may help to inform evaluations of the phenomenon alongside other criteria. Considered together, these factors likely suggest that the practice is difficult to justify.

Much work on the topic remains. While this exploration has searched for guiding normative principles, it has not addressed the question of which institution should authoritatively settle disputes about their application. When there are reasonable disagreements about whether the reciprocal hierarchy has been violated, for example, who should resolve them—a judge, Congress, members of civil society, others? Another important question going forward is the extent to which norm violations by the President or his appointees warrant norm violations by those serving them. Overt bureaucratic resistance also captures only a small fraction of pushback by bureaucrats, which is more often covert and anonymous. In this sense, this work can be fairly criticized for sacrificing scope for timeliness. Covert resistance requires its own sustained evaluation, as well as comparison with other forms of defiance such as conscientious objection, leaking and uncivil obedience.

Bureaucratic resistance, broadly defined, is neither exceptional nor unprecedented. Even the most ardent proponents of executive power may have to acknowledge that some forms of it are inevitable in hierarchies with imperfect information. Like civil disobedience by private citizens, civil servant disobedience raises difficult questions about how to resolve the rule of law with competing values like managerial efficiency. Debates about the phenomenon will inevitably continue to be informed by contemporary dynamics; indeed, the Trump Administration, more than most presidencies, has highlighted how the ideal of the unitary executive can falter in practice. Whether the administrative state stands to be strengthened or weakened as a result remains to be seen.